

103^D CONGRESS
2^D SESSION

S. 2490

To amend the Federal Water Pollution Control Act to establish a comprehensive program for conserving and managing wetlands and waters of the United States, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 30 (legislative day, SEPTEMBER 12), 1994

Mr. PRESSLER introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

A BILL

To amend the Federal Water Pollution Control Act to establish a comprehensive program for conserving and managing wetlands and waters of the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Comprehensive Wet-
5 lands Conservation and Management Act of 1994”.

6 **SEC. 2. FINDINGS AND STATEMENT OF PURPOSE.**

7 (a) FINDINGS.—Congress finds that—

1 (1) wetlands play an integral role in maintain-
2 ing high quality of life through material contribu-
3 tions to the national economy, food supply, water
4 supply and quality, flood control, and fish, wildlife,
5 and plant resources, and to the health, safety, recre-
6 ation, and economic well-being of citizens throughout
7 the United States;

8 (2) wetlands serve important ecological and nat-
9 ural resource functions, such as providing essential
10 nesting and feeding habitat for waterfowl, other
11 wildlife, and many rare and endangered species, fish-
12 eries habitat, the enhancement of water quality, and
13 natural flood control;

14 (3) much of the wetlands resource of the United
15 States has sustained significant loss or degradation,
16 resulting in the need for effective programs to limit
17 the loss and degradation of ecologically significant
18 wetlands and to provide for long-term restoration
19 and enhancement of the wetlands resource base;

20 (4) because 75 percent of the wetlands in the
21 lower 48 States is privately owned and because the
22 majority of the population of the United States lives
23 in or near wetlands, an effective wetlands conserva-
24 tion and management program must reflect a bal-
25 anced approach that conserves and enhances impor-

1 tant wetlands functions and values while observing
2 private property rights, recognizing the need for es-
3 sential public infrastructure, such as highways,
4 ports, airports, sewer systems, and public water sup-
5 ply systems, and providing the opportunity for sus-
6 tained economic growth; and

7 (5) the Federal permit program established
8 under section 404 of the Federal Water Pollution
9 Control Act (33 U.S.C. 1344) was not originally
10 conceived as a wetlands regulatory program and is
11 insufficient to ensure that the wetlands resource
12 base of the United States will be conserved and
13 managed in a fair and environmentally sound man-
14 ner.

15 (b) PURPOSE.—The purpose of this Act is to estab-
16 lish a new Federal regulatory program for activities in
17 wetlands and waters of the United States to—

18 (1) assert Federal regulatory jurisdiction over a
19 broad category of specifically identified activities
20 that result in the loss or degradation of wetlands
21 and waters of the United States;

22 (2) account for variations in wetlands functions
23 or values in determining the character and extent of
24 regulation of activities occurring in wetlands;

1 (3) provide sufficient regulatory incentives for
2 conservation, restoration, or enhancement activities;

3 (4) encourage conservation of resources on an
4 ecosystem basis to the fullest extent practicable; and

5 (5) balance public and private interests in de-
6 termining the conditions under which activity in wet-
7 lands and waters of the United States may occur.

8 **SEC. 3. WETLANDS CONSERVATION AND MANAGEMENT.**

9 Title IV of the Federal Water Pollution Control Act
10 (33 U.S.C. 1341 et seq.) is amended by striking section
11 404 and inserting the following new section:

12 **“SEC. 404. PERMITS FOR ACTIVITIES IN WETLANDS OR WA-**
13 **TERS OF THE UNITED STATES.**

14 “(a) DEFINITIONS.—As used in this section:

15 “(1) ACTIVITY IN WETLANDS OR WATERS OF
16 THE UNITED STATES.—The term ‘activity in wet-
17 lands or waters of the United States’ means—

18 “(A) the discharge of dredged or fill mate-
19 rial into waters of the United States, including
20 wetlands at a specific disposal site; or

21 “(B) the draining, channelization, or exca-
22 vation of wetlands.

23 “(2) CREATION.—The term ‘creation’, used
24 with respect to wetlands, means an activity that
25 brings wetlands into existence, at a site where the

1 wetlands did not formerly occur, for the purpose of
2 compensation.

3 “(3) DIRECTOR.—The term ‘Director’, used
4 without further modification, means the Director of
5 the United States Fish and Wildlife Service.

6 “(4) ENHANCEMENT.—The term ‘enhance-
7 ment’, used with respect to wetlands or waters of the
8 United States, means an activity that increases the
9 value of a function in wetlands or waters of the
10 United States.

11 “(5) FASTLANDS.—The term ‘fastlands’ means
12 lands located behind permitted manmade structures,
13 such as lands located behind a levee to permit utili-
14 zation of the lands for commercial, industrial, or res-
15 idential purposes consistent with each local land use
16 planning requirement.

17 “(6) GROWING SEASON.—The term ‘growing
18 season’ means, for each plant hardiness zone, the
19 period between the average date of last frost in
20 spring and the average date of first frost in autumn.

21 “(7) INCIDENTALY CREATED.—The term ‘inci-
22 dentally created’, used with respect to wetlands,
23 means lands that otherwise meet the standards for
24 delineation of wetlands described in paragraphs (1)
25 and (2) of subsection (g), if a characteristic of the

1 wetlands is the unintended result of a human in-
2 duced alteration of hydrology.

3 “(8) MAINTENANCE.—The term ‘maintenance’
4 means an activity undertaken to ensure continuation
5 of wetlands or the accomplishment of a project goal
6 after a wetlands restoration or wetlands creation
7 project has been technically completed, including
8 water level manipulation and control of any
9 nonnative plant species.

10 “(9) MITIGATION BANKING.—The term ‘mitiga-
11 tion banking’ means wetlands restoration, enhance-
12 ment, preservation, or creation for the purpose of
13 providing compensation for wetlands loss or deg-
14 radation.

15 “(10) NORMAL FARMING, SILVICULTURE, AQUA-
16 CULTURE, OR RANCHING ACTIVITY.—The term ‘nor-
17 mal farming, silviculture, aquaculture, or ranching
18 activity’ means a normal ongoing practice identified
19 as a normal ongoing activity by the Secretary of Ag-
20 riculture (in consultation with the Cooperative Ex-
21 tension Service for each State, the land-grant uni-
22 versity system, and the agricultural colleges of the
23 State), taking into account any existing practice (as
24 of the date of the identification) and any other prac-

1 tice that may be identified in consultation with the
2 affected industry or community.

3 “(11) PRIOR CONVERTED CROPLAND.—The
4 term ‘prior converted cropland’ means lands that
5 were both manipulated (by drainage or other phys-
6 ical alteration to remove excess water from the land)
7 and cropped before December 23, 1985, to the ex-
8 tent that the lands no longer exhibit significant wet-
9 lands functions or values.

10 “(12) RESTORATION.—The term ‘restoration’,
11 used with respect to wetlands, means an activity un-
12 dertaken to return wetlands from a disturbed or al-
13 tered condition with lesser wetlands acreage or fewer
14 wetlands functions or values to a previous condition
15 with greater wetlands acreage or more wetlands
16 functions or values.

17 “(13) SECRETARY.—The term ‘Secretary’, used
18 without further modification, means the Secretary of
19 the Army.

20 “(14) TEMPORARY.—The term ‘temporary’,
21 used with respect to an impact, means the disturb-
22 ance or alteration of wetlands or waters of the
23 United States caused by an activity under a cir-
24 cumstance in which, not later than 3 years following

1 the commencement of the activity, the wetlands or
2 waters—

3 “(A) are returned to the condition in exist-
4 ence prior to the commencement of the activity;
5 or

6 “(B) display a condition sufficient to en-
7 sure that without further human action the
8 wetlands or waters will return to the condition
9 in existence prior to the commencement of the
10 activity.

11 “(15) WETLANDS.—The term ‘wetlands’ means
12 lands that meet the standards for delineation of
13 lands as wetlands set forth in paragraphs (1) and
14 (2) of subsection (g).

15 “(16) WETLANDS FUNCTIONS.—The term ‘wet-
16 lands functions’ means the roles wetlands serve that
17 are of value, including flood water storage, flood
18 water conveyance, ground water discharge, erosion
19 control, wave attenuation, water quality protection,
20 scenic and aesthetic use, food chain support, fishery
21 support, wetlands plant habitat support, aquatic
22 habitat support, and habitat for wetlands-dependent
23 wildlife support.

24 “(b) AUTHORIZED ACTIVITIES.—

1 “(1) PERMIT REQUIREMENT.—No person shall
2 undertake an activity in wetlands or waters of the
3 United States unless the activity is undertaken pur-
4 suant to a permit issued by the Secretary, except as
5 provided in paragraph (3).

6 “(2) ISSUANCE OF PERMITS.—The Secretary
7 may issue permits authorizing activities in wetlands
8 or waters of the United States in accordance with
9 the requirements of this section.

10 “(3) ACTIVITIES NOT REQUIRING PERMITS.—
11 An activity in wetlands or waters of the United
12 States may be undertaken without a permit de-
13 scribed in paragraph (2) from the Secretary if the
14 activity is authorized under paragraph (5) or (6) of
15 subsection (e), is exempt under subsection (f), or is
16 otherwise exempt under another provision of this
17 section.

18 “(4) APPLICATION.—Any person seeking to un-
19 dertake an activity in wetlands or waters of the
20 United States shall submit an application to the Sec-
21 retary identifying the site of the activity. The appli-
22 cant shall also provide such additional information
23 regarding the proposed activity as may be necessary
24 or appropriate for purposes of determining whether

1 and under what conditions the proposed activity may
2 be permitted to occur.

3 “(c) WETLANDS CLASSIFICATION.—

4 “(1) APPLICATION.—In submitting an applica-
5 tion under subsection (b), any person seeking to un-
6 dertake an activity in wetlands for which a permit
7 is required under subsection (b) shall request that
8 the Secretary determine, in accordance with para-
9 graph (3), the classification of the wetlands in which
10 the activity is proposed to occur. The applicant shall
11 also provide such information as may be necessary
12 or appropriate for determining the classification of
13 wetlands.

14 “(2) NOTICE.—

15 “(A) IN GENERAL.—Except as provided in
16 subparagraph (B), not later than 90 days after
17 the receipt of an application described in para-
18 graph (1) relating to an activity in wetlands,
19 the Secretary shall provide notice to the appli-
20 cant of the classification of the wetlands that
21 are the subject of the application and shall
22 state in writing the basis for the classification.
23 The classification of the wetlands that are the
24 subject of the application shall be determined
25 by the Secretary in accordance with the require-

1 ments for classification of wetlands under para-
2 graphs (3), (4), and (5).

3 “(B) NOTICE REGARDING ADVANCE CLAS-
4 SIFICATION.—In the case of an application pro-
5 posing an activity located in wetlands that are
6 the subject of an advance classification under
7 subsection (h), the Secretary shall provide no-
8 tice to the applicant of the classification within
9 30 days following the receipt of the application,
10 and shall provide an opportunity for review of
11 the classification under paragraphs (4) and (5).

12 “(3) CLASSIFICATION.—On receipt of an appli-
13 cation under this subsection with respect to wet-
14 lands, the Secretary shall, in accordance with the
15 standards and procedures established by regulation
16 issued under subsection (i)—

17 “(A) classify as type A wetlands the wet-
18 lands that are of critical significance to the
19 long-term conservation of the ecosystem of
20 which the wetlands are a part if—

21 “(i) the wetlands serve critical wet-
22 lands functions and values, including the
23 provision of critical habitat for a con-
24 centration of avian, aquatic, or wetlands-
25 dependent wildlife;

1 “(ii)(I) the wetlands consist of or are
2 a portion of 10 or more contiguous acres
3 and have an inlet or outlet for relief of
4 water flow; or

5 “(II) the wetlands contain a prairie
6 pothole feature, playa lake, or vernal pool;

7 “(iii) there exists a scarcity within the
8 watershed or aquatic ecosystem of identi-
9 fied ecological functions served by the wet-
10 lands such that the use of the wetlands for
11 an activity in wetlands or waters of the
12 United States would seriously jeopardize
13 the availability of the identified functions;

14 “(iv) there is no overriding public in-
15 terest in the use of the wetlands for pur-
16 poses other than conservation; and

17 “(v) the nature and scope of the wet-
18 lands functions and values of the wetlands
19 are such that minimization and compensa-
20 tion are not feasible means for conserving
21 the wetlands functions and values;

22 “(B) classify as type B wetlands the wet-
23 lands that provide habitat for a significant pop-
24 ulation of avian, aquatic, or wetlands-dependent
25 wildlife, or provide other significant wetlands

1 functions and values, including significant en-
2 hancement or protection of water quality in wa-
3 ters of the United States, or significant natural
4 flood control; and

5 “(C) classify as type C wetlands the wet-
6 lands that—

7 “(i) serve limited wetlands functions
8 and values;

9 “(ii) serve marginal wetlands func-
10 tions and values but that exist in such
11 abundance that regulation of activities in
12 the wetlands is not necessary for conserv-
13 ing important wetlands functions and val-
14 ues;

15 “(iii) are prior converted cropland;

16 “(iv) are fastlands; or

17 “(v) are wetlands within industrial
18 complexes or other intensely developed
19 areas that do not serve significant wet-
20 lands functions and values as a result of
21 the location.

22 “(4) DE NOVO DETERMINATION.—Not later
23 than 30 days after receipt of notice of an advance
24 classification by the Secretary under paragraph
25 (2)(B), an applicant may request that the Secretary

1 make a de novo determination of the classification of
2 wetlands that are the subject of the notice. The de
3 novo determination shall be made by the Secretary
4 in consultation with the Director. The Secretary may
5 sustain the advance classification made by the Direc-
6 tor. The Secretary may modify the classification if
7 the Secretary determines, on examination of all rel-
8 evant information submitted by the applicant or oth-
9 erwise available to the Secretary (including, if appro-
10 priate, an on-the-ground examination) that—

11 “(A) the lands involved do not meet the
12 standards for delineating wetlands set forth in
13 paragraph (1) or (2) of subsection (g);

14 “(B) the weight of relevant information
15 does not support the determination of the ad-
16 vance classification with respect to the specific
17 wetlands involved;

18 “(C) the factual basis for the advance clas-
19 sification is no longer valid; or

20 “(D) the limitations on uses of the specific
21 wetlands involved that would be imposed by the
22 Secretary under this section would effectively
23 preclude reasonable economic use of the wet-
24 lands.

1 “(5) APPEALS.—In the event that the Secretary
2 delegates authority to determine the classification of
3 wetlands under paragraphs (3) and (4), the Sec-
4 retary shall, by regulation, provide for a right of ap-
5 peal to the Secretary or the designee of the Sec-
6 retary of the classification of wetlands under para-
7 graph (3) or the de novo determination of an ad-
8 vance classification in accordance with paragraph
9 (4).

10 “(6) MAXIMUM PERCENT OF LANDS CLASSIFIED
11 AS TYPE A WETLANDS.—No more than 20 percent
12 of any county, parish, or borough shall be classified
13 as type A wetlands. For purposes of this paragraph,
14 a county, parish, or borough includes any land in the
15 county, parish, or borough that is owned by the
16 United States or by a State, including land in a unit
17 of the National Wildlife Refuge System, land in the
18 National Park System, and land in a conservation
19 easement.

20 “(d) COMPENSATION FOR LANDOWNERS.—

21 “(1) ELECTION TO SEEK COMPENSATION.—Any
22 person (including a State or political subdivision of
23 a State) who owns an interest in lands that have
24 been classified as type A wetlands by the Secretary
25 under subsection (c)(3)(A) or by the Director under

1 subsection (h) may, not later than 2 years after re-
2 ceipt of actual notice of the classification (or not
3 later than 2 years after a de novo determination of
4 the classification under subsection (c)(4)), notify the
5 Secretary and the Director that the person is elect-
6 ing to seek compensation for the fair market value
7 of the interest in lands at the time of the classifica-
8 tion, in accordance with the requirements of this
9 section. The fair market value may include reason-
10 able attorney's fees and shall be calculated without
11 regard to any diminution in value resulting from the
12 applicability of this section.

13 “(2) NEGOTIATIONS.—Immediately on receipt
14 by the Secretary and the Director of notification of
15 election to seek compensation under paragraph (1),
16 the Director shall enter into good faith negotiations
17 with the owner for purposes of determining the value
18 of the interest in lands that have been classified as
19 type A wetlands. Not later than 90 days after re-
20 ceipt of the notification of election by the owner
21 under paragraph (1), the Director shall make an
22 offer of reasonable compensation to the owner.

23 “(3) ACTION OF OWNER.—

24 “(A) IN GENERAL.—Not later than 6 years
25 after the date the Director makes an offer of

1 compensation under paragraph (2), the owner
2 shall provide notice that the owner, in the dis-
3 cretion of the owner—

4 “(i) accepts the offer of compensation;

5 “(ii) has filed a claim for determina-
6 tion of the value of the compensation de-
7 scribed in paragraph (1) with the United
8 States Court of Federal Claims; or

9 “(iii) advises the Director and the
10 Secretary that the owner elects to retain
11 title to the wetlands and elects not to re-
12 ceive compensation for the taking of land
13 under this subsection.

14 “(B) FAILURE TO PROVIDE NOTICE.—Fail-
15 ure to provide notice in accordance with this
16 paragraph shall be deemed an election to retain
17 title to the wetlands and not to receive com-
18 pensation under this subsection.

19 “(4) EFFECT OF ACCEPTANCE OF OFFER OR
20 FILING OF CLAIM.—On acceptance of an offer of
21 compensation, or the filing of a claim for determina-
22 tion of the value of compensation, under paragraph
23 (3), the classification as type A wetlands of the wet-
24 lands that are the subject of the offer or claim shall
25 be binding on the owner and any successor in inter-

1 est, and the title to the lands shall pass to the Unit-
2 ed States. The classification of the lands as type A
3 wetlands under this paragraph shall constitute a
4 taking by the United States of the interests in the
5 lands of the owner and shall be compensable under
6 this subsection.

7 “(5) EXTENT OF TAKING.—A taking under this
8 subsection shall be deemed to be a taking of surface
9 interests in lands only, with the following exceptions:

10 “(A) EXPLORATION OR DEVELOPMENT
11 NOT COMPATIBLE WITH CONSERVATION.—If the
12 Secretary determines that the exploration for or
13 development of oil and gas or mineral interests
14 is not compatible with conservation of the sur-
15 face interests in lands that have been classified
16 as type A wetlands located above the oil and
17 gas or mineral interests (or located adjacent to
18 the oil and gas or mineral interests where the
19 adjacent lands are necessary to provide reason-
20 able access to the interests), the Secretary may
21 classify the oil and gas or mineral interests as
22 type A wetlands and notify the owner of the in-
23 terests that the owner may elect to receive com-
24 pensation for the interests under paragraph (1).

1 “(B) FAILURE TO PROVIDE REASONABLE
2 ACCESS.—The failure of the Secretary to pro-
3 vide reasonable access to oil and gas or mineral
4 interests located beneath or adjacent to surface
5 interests of type A wetlands shall be deemed a
6 taking of the oil and gas or mineral interests.
7 The Secretary shall classify the oil and gas or
8 mineral interests as type A wetlands and notify
9 the owner of the interests that the owner may
10 elect to receive compensation for the interests
11 under paragraph (1).

12 “(6) JURISDICTION.—The United States Court
13 of Federal Claims shall have jurisdiction—

14 “(A) to determine the value of interests
15 taken and the fair compensation required under
16 this subsection and the Constitution;

17 “(B) in the case of oil and gas or mineral
18 interests, to require the United States to pro-
19 vide reasonable access in, across, or through
20 lands that may be the subject of a taking under
21 this subsection solely for the purpose of under-
22 taking activity necessary to determine the value
23 of the interests taken; and

24 “(C) to provide other equitable remedies
25 determined to be appropriate.

1 “(7) EXECUTION OF JUDGMENT.—Any judg-
2 ment rendered under paragraph (6) may be exe-
3 cuted, at the election of the owner. Any owner seek-
4 ing to execute such a judgment shall execute the
5 judgment not later than 2 years after the date the
6 judgment is rendered. The owner may, prior to the
7 execution of the judgment, enter into an agreement
8 with the United States for satisfaction of the judg-
9 ment through a crediting of a tax benefit, acquisi-
10 tion of an interest in oil and gas or minerals, an ex-
11 change of interests in lands with the United States,
12 or other means of compensation.

13 “(8) CONSTRUCTION.—

14 “(A) AVAILABILITY OF OTHER REM-
15 EDIES.—The remedy for a taking of an interest
16 in lands under this subsection shall not be con-
17 strued to preempt, alter, or limit the availability
18 of other remedies for the taking of the interest
19 in lands under the Constitution or under State
20 law, including the taking of rights to the use of
21 water allocated under State law or the taking of
22 the interest in lands by denial of a permit
23 under this section.

24 “(B) TAKING BY DENIAL OF A PERMIT.—

25 Any award of compensation for the taking of an

1 interest in lands by denial of a permit under
2 this section shall be based on the fair market
3 value of the interest in lands at the time of the
4 taking. The fair market value may include rea-
5 sonable attorney's fees and shall be calculated
6 without regard to any diminution in value re-
7 sulting from the applicability of this section.

8 “(9) MANAGEMENT.—Interests in lands ac-
9 quired by the United States under this subsection
10 shall be managed by the United States Fish and
11 Wildlife Service as a part of the National Wildlife
12 Refuge System unless the Secretary of the Interior,
13 acting through the Director, makes a determination
14 otherwise, or unless otherwise provided by law.

15 “(10) REQUIREMENTS GOVERNING USE OF
16 WATER.—No action taken under this subsection
17 shall be construed to alter or supersede requirements
18 governing use of water applicable under State law.

19 “(e) REQUIREMENTS APPLICABLE TO PERMITTED
20 ACTIVITY.—

21 “(1) ISSUANCE OR DENIAL OF PERMITS.—Fol-
22 lowing the provision of notice of wetlands classifica-
23 tion pursuant to subsection (c) if applicable, and
24 after compliance with the requirements of subsection
25 (d) if applicable, the Secretary may issue or deny a

1 permit for authorization to undertake an activity in
2 wetlands or waters of the United States, in accord-
3 ance with the requirements of this subsection.

4 “(2) TYPE A WETLANDS.—

5 “(A) IN GENERAL.—The Secretary shall
6 deny a permit authorizing an activity in type A
7 wetlands unless the Secretary determines
8 that—

9 “(i) the activity can be undertaken
10 with minimal alteration or surface disturb-
11 ance of the wetlands; or

12 “(ii) the proposed use of the land,
13 taking into account all proposed mitiga-
14 tion, will result in overall environmental
15 benefits, including the prevention of wet-
16 lands loss or degradation.

17 “(B) TERMS AND CONDITIONS CONCERN-
18 ING MITIGATION.—Any permit issued authoriz-
19 ing activities in type A wetlands may contain
20 such terms and conditions concerning mitiga-
21 tion (including terms and conditions applicable
22 under paragraph (3) for type B wetlands) as
23 the Secretary determines to be appropriate to
24 prevent the unacceptable loss or degradation of
25 type A wetlands.

1 “(3) TYPE B WETLANDS.—

2 “(A) CONSIDERATIONS.—The Secretary
3 may issue a permit authorizing an activity in
4 type B wetlands subject to such terms and con-
5 ditions as the Secretary finds are necessary to
6 ensure that the watershed or aquatic ecosystem
7 of which the wetlands are a part does not suffer
8 significant loss or degradation of wetlands func-
9 tions and values. In determining whether spe-
10 cific terms and conditions are necessary to
11 avoid a significant loss or degradation of wet-
12 lands functions and values, the Secretary shall
13 consider the following:

14 “(i) The quality and quantity of eco-
15 logically significant functions and values
16 served by the areas to be affected.

17 “(ii) The opportunities to reduce im-
18 pacts through cost-effective design to avoid
19 or minimize use of wetlands.

20 “(iii) The costs of mitigation require-
21 ments and the social, recreational, and eco-
22 nomic benefits associated with the pro-
23 posed activity, including local, regional, or
24 national needs for improved or expanded
25 infrastructure.

1 “(iv) The ability of the applicant for
2 the permit to mitigate wetlands loss or
3 degradation as measured by wetlands func-
4 tions and values.

5 “(v) The environmental benefit, meas-
6 ured by wetlands functions and values,
7 that may occur through mitigation efforts,
8 including restoration, preservation, en-
9 hancement, or creation of wetlands func-
10 tions and values.

11 “(vi) The marginal impact of the pro-
12 posed activity on the watershed or aquatic
13 ecosystem of which the wetlands are a
14 part.

15 “(B) ALTERNATIVE SITE ANALYSES AND
16 PROJECT PURPOSES.—In considering applica-
17 tions for permits with respect to activities on
18 type B wetlands, the Secretary may require al-
19 ternative site analyses for individual permit ap-
20 plications involving the alteration or permanent
21 surface disturbance of 10 or more contiguous
22 acres of wetlands. In the case of such an appli-
23 cation, there shall be a rebuttable presumption
24 that the project purpose for the activities as de-
25 fined by the applicant shall be binding on the

1 Secretary. In the case of such an application,
2 the definition of project purpose for the activi-
3 ties sponsored by a public agency shall be bind-
4 ing on the Secretary, subject to the authority of
5 the Secretary to impose mitigation requirements
6 to minimize impacts on wetlands functions and
7 values, including cost-effective redesign of the
8 project to avoid wetlands.

9 “(C) REQUIREMENTS FOR MITIGATION.—

10 Except as otherwise provided in this section, re-
11 quirements for mitigation shall be imposed if
12 the Secretary finds that activities undertaken
13 under this section will result in the loss or deg-
14 radation of type B wetlands functions and val-
15 ues where the loss or degradation is not an inci-
16 dental or a temporary impact. When determin-
17 ing the mitigation requirements in any specific
18 case, the Secretary shall take into consideration
19 the characteristics of the wetlands affected, the
20 character of the impact on ecological functions,
21 whether any adverse effects on wetlands are of
22 a permanent or temporary nature, and the cost-
23 effectiveness of the mitigation and shall seek to
24 minimize the costs of the mitigation.

1 “(D) REGULATIONS GOVERNING REQUIRE-
2 MENTS FOR MITIGATION.—The Secretary shall
3 issue regulations under subsection (i) governing
4 requirements for compensatory mitigation, for
5 activities occurring in type B wetlands, that
6 allow for—

7 “(i) minimization of impacts through
8 project design for the activities, including
9 avoidance of specific wetlands impacts
10 where economically practicable and consist-
11 ent with the project purpose, provisions for
12 compensatory mitigation, if any, and other
13 terms and conditions necessary and appro-
14 priate in the public interest;

15 “(ii) preservation or donation of type
16 A wetlands or type B wetlands (if title has
17 not been acquired by the United States
18 and no compensation for the taking of the
19 wetlands has been provided) as mitigation
20 for activities that result in loss or degrada-
21 tion of wetlands;

22 “(iii) enhancement or restoration of
23 lost or degraded wetlands as compensation
24 for wetlands lost or degraded through per-
25 mitted activity;

1 “(iv) compensation through contribu-
2 tion to a mitigation banking program es-
3 tablished for a State pursuant to subpara-
4 graph (F);

5 “(v) offsite compensatory mitigation
6 with respect to an activity in a wetlands, if
7 the mitigation contributes to the restora-
8 tion, enhancement, or creation of signifi-
9 cant wetlands functions and values on a
10 watershed or ecosystem-wide basis and is
11 balanced with the effects that an activity
12 proposed to be carried out under a permit
13 will have on the specific site (except that
14 offsite compensatory mitigation, if any,
15 shall be required only in the State in which
16 the proposed activity is to occur, and shall,
17 to the extent practicable, be within the wa-
18 tershed or aquatic ecosystem within which
19 the proposed activity is to occur, unless
20 otherwise consistent with a State wetlands
21 management plan);

22 “(vi) contribution of in-kind value ac-
23 ceptable to the Secretary and otherwise au-
24 thorized by law;

1 “(vii) in areas subject to wetlands loss
2 or degradation, construction of coastal pro-
3 tection and enhancement projects;

4 “(viii) contribution of resources of
5 more than 1 permit recipient toward a sin-
6 gle mitigation project; and

7 “(ix) other mitigation measures deter-
8 mined by the Secretary to be appropriate,
9 in the public interest, and consistent with
10 the requirements and purposes of this Act.

11 “(E) COMPENSATORY MITIGATION.—Not-
12 withstanding subparagraph (C), the Secretary
13 may determine not to impose requirements for
14 compensatory mitigation, with respect to an ac-
15 tivity in a wetlands, if the Secretary finds
16 that—

17 “(i) the adverse impacts of an activity
18 proposed to be carried out under a permit
19 are limited;

20 “(ii) the failure to impose compen-
21 satory mitigation requirements is compat-
22 ible with maintaining wetlands functions
23 and values and no practicable and reason-
24 able means of compensatory mitigation is
25 available;

1 “(iii) there is an abundance of similar
2 significant wetlands functions and values
3 in or near the area in which the proposed
4 activity is to occur that will continue to
5 serve the functions and values lost or de-
6 graded as a result of the activity, taking
7 into account the impacts of the activity
8 and the cumulative impacts of similar ac-
9 tivity in the area;

10 “(iv) the temporary character of the
11 impacts and the use of minimization tech-
12 niques make compensatory mitigation un-
13 necessary to protect significant wetlands
14 functions and values; or

15 “(v) a waiver from requirements for
16 compensatory mitigation is necessary to
17 prevent special hardship.

18 “(F) MITIGATION BANKING PROGRAM.—

19 “(i) ESTABLISHMENT.—The Sec-
20 retary, in consultation with the Director,
21 shall establish a mitigation banking pro-
22 gram in each State. The mitigation bank-
23 ing program shall be developed in consulta-
24 tion with the Director and the Governor of
25 the State in which the wetlands covered by

1 the mitigation banking program is located.
2 After approval of the program by the Sec-
3 retary, the Secretary may require contribu-
4 tions to the program as a means for ensur-
5 ing compensation for loss and degradation
6 of wetlands functions and values in the
7 State in accordance with the requirements
8 of this paragraph.

9 “(ii) PRIMARY OBJECTIVE.—The pri-
10 mary objective of the programs shall be to
11 provide for the restoration, enhancement,
12 or, where feasible, creation of ecologically
13 significant wetlands on an ecosystem basis.

14 “(iii) FUNCTIONS AND VALUES.—
15 Each program described in clause (i)
16 shall—

17 “(I) provide a preference for
18 large-scale projects for conservation,
19 enhancement, or restoration of wet-
20 lands, unless the Secretary (or the
21 Governor of a State that is admin-
22 istering a State permit program under
23 subsection (l)) determines that a
24 smaller project will contribute sub-
25 stantially to the conservation, en-

1 hancement, or restoration of eco-
2 logically significant wetlands functions
3 and values or that the restoration of
4 indigenous wetlands resources cannot
5 be accomplished through large-scale
6 projects;

7 “(II) authorize mitigation banks
8 sponsored by private entities or public
9 entities;

10 “(III) provide for the crediting to
11 a State or privately maintained miti-
12 gation bank of contributions in land
13 or cash, or in-kind contributions, so
14 that persons unable to sponsor spe-
15 cific mitigation projects can contribute
16 to the mitigation bank;

17 “(IV) have sufficient require-
18 ments to ensure completion, mainte-
19 nance, and supervision of wetlands
20 projects for at least a 25-year period,
21 including requirements for bonds or
22 other evidence of financial responsibil-
23 ity;

1 “(V) authorize the imposition of
2 bonding requirements on private enti-
3 ties operating the banks;

4 “(VI) limit activities in or on
5 wetlands that are part of a mitigation
6 bank to uses that are consistent with
7 maintaining or gaining significant
8 wetlands functions and values; and

9 “(VII) authorize a credit to be
10 provided on an acre-for-acre or value-
11 for-value basis for type A and B wet-
12 lands that are permanently protected
13 in national conservation units in any
14 State that has converted less than 10
15 percent of the historic wetlands base
16 of the State to other uses.

17 “(4) ACTION ON APPLICATIONS.—

18 “(A) TIMING.—In the case of any applica-
19 tion for authorization to undertake activities in
20 wetlands or waters of the United States that
21 are not type C wetlands, final action by the
22 Secretary shall occur not later than 180 days
23 after the date the application is filed, unless—

1 “(i) the Secretary and the applicant
2 agree that the final action shall occur with-
3 in a shorter or longer period of time;

4 “(ii) the Secretary determines that an
5 additional, specified period of time is nec-
6 essary to permit the Secretary to comply
7 with other applicable Federal law; or

8 “(iii) the Secretary, not later than 15
9 days after the date the application is re-
10 ceived, notifies the applicant that the ap-
11 plication does not contain all information
12 necessary to allow the Secretary to con-
13 sider the application and identifies any
14 necessary additional information, in which
15 case the provisions of subparagraph (B)
16 shall apply.

17 “(B) ADDITIONAL INFORMATION.—On the
18 receipt of a request for additional information
19 under subparagraph (A)(iii), the applicant shall
20 supply the additional information and shall pro-
21 vide notice to the Secretary that the application
22 contains all requested additional information
23 and is therefore complete. The Secretary may—

24 “(i) not later than 30 days after the
25 receipt of notice from the applicant that

1 the application is complete, determine that
2 the application does not contain all re-
3 quested additional information and, on the
4 basis of the determination, deny the appli-
5 cation without prejudice with respect to re-
6 submission; or

7 “(ii) not later than 180 days after the
8 receipt of notice from the applicant that
9 the application is complete, review the ap-
10 plication and take final action on the appli-
11 cation.

12 “(C) FAILURE TO ACT ON APPLICATION.—

13 If the Secretary fails to take final action on an
14 application as provided in subparagraph (B)(ii),
15 on the 180th day described in such subpara-
16 graph a permit shall be presumed to be granted
17 authorizing the activities proposed in the appli-
18 cation under such terms and conditions as are
19 stated in the completed application.

20 “(D) APPEALS.—Not later than 60 days
21 after the date of a decision of the Secretary de-
22 nying a permit requested in an application
23 under this paragraph, the applicant may appeal
24 the decision to the Secretary of Defense or the
25 designee of the Secretary of Defense. On such

1 an appeal, the Secretary of Defense or the des-
2 ignee shall uphold the decision of the Secretary
3 of the Army if the Secretary of the Army
4 proves by clear and convincing evidence that
5 granting the permit requested in the application
6 would be inconsistent with this section.

7 “(5) TYPE C WETLANDS.—

8 “(A) PERMIT NOT REQUIRED.—Activities
9 in wetlands that have been classified as type C
10 wetlands under subsection (c)(3)(C) by the Sec-
11 retary or under subsection (h) by the Director
12 may be undertaken without a permit referred to
13 in subsection (b).

14 “(B) REPORTING REQUIREMENTS.—The
15 Secretary may establish requirements for re-
16 porting activities undertaken in type C wet-
17 lands.

18 “(C) ALTERNATIVE SITE ANALYSIS AND
19 MITIGATION NOT REQUIRED.—No requirements
20 for alternative site analyses or mitigation of en-
21 vironmental impacts shall apply for activities
22 undertaken in type C wetlands.

23 “(6) NATIONAL, REGIONAL, OR STATEWIDE
24 GENERAL PERMITS.—

1 “(A) IN GENERAL.—The Secretary may, in
2 accordance with a regulation issued under sub-
3 section (i), issue general permits on a national,
4 regional, or statewide basis for any category of
5 activities in wetlands or waters of the United
6 States for which a permit would otherwise be
7 required under subsection (b), if the Secretary
8 determines that the activities in the category
9 are similar in nature and that the activities,
10 whether performed separately or cumulatively,
11 will not result in a significant loss or degrada-
12 tion of ecologically significant wetlands func-
13 tions and values or of ecologically significant
14 waters of the United States. Permits issued
15 under this paragraph shall include procedures
16 for expedited review of eligibility for the permits
17 (if the review is required) and may include re-
18 quirements for reporting and mitigation. The
19 Secretary may impose requirements for compen-
20 satory mitigation for the permits if necessary to
21 avoid or minimize the significant loss or deg-
22 radation of significant wetlands functions and
23 values where the loss or degradation is not an
24 incidental or a temporary impact.

1 “(B) EXISTING GENERAL PERMITS.—Gen-
2 eral permits issued on a national or regional
3 basis for activities in the wetlands or waters of
4 the United States and in effect on the date of
5 enactment of the Comprehensive Wetlands Con-
6 servation and Management Act of 1994 shall
7 remain in effect until otherwise modified by the
8 Secretary.

9 “(f) ACTIVITIES NOT REQUIRING PERMIT.—

10 “(1) ACTIVITIES.—Except as provided in para-
11 graph (3), activities in wetlands or waters of the
12 United States shall be exempt from the requirements
13 of this section and shall not be prohibited by or oth-
14 erwise subject to regulation under this section or
15 section 301 or 402 (except to the extent such sec-
16 tions relate to compliance with effluent standards or
17 prohibitions under section 307), if the activities—

18 “(A) result from normal farming,
19 silviculture, aquaculture, or ranching activities
20 and practices, such as plowing, seeding, cul-
21 tivating, minor drainage, burning of vegetation
22 in connection with the activities and practices,
23 harvesting for the production of food, fiber, or
24 forest products, or upland soil and water con-
25 servation practices;

1 “(B) are for the purpose of maintenance,
2 including emergency reconstruction of recently
3 damaged parts of currently (as of the date of
4 the maintenance) serviceable structures such as
5 dikes, dams, levees, water control structures,
6 groins, riprap, breakwaters, causeways, and
7 bridge abutments or approaches, and transpor-
8 tation structures;

9 “(C) are for the purpose of construction or
10 maintenance of farm, stock, or aquaculture
11 ponds or irrigation canals and ditches, or the
12 maintenance of drainage ditches;

13 “(D) are for the purpose of construction of
14 temporary sedimentation basins on a construc-
15 tion site that does not include placement of fill
16 material into navigable waters;

17 “(E) are for the purpose of construction or
18 maintenance of farm roads or forest roads, or
19 temporary roads for moving mining equipment,
20 if the roads are constructed and maintained, in
21 accordance with best management practices, to
22 ensure that flow and circulation patterns and
23 chemical and biological characteristics of the
24 waters involved are not impaired, that the reach
25 of the waters is not reduced, and that any ad-

1 verse effect on the aquatic environment will be
2 otherwise minimized;

3 “(F) are undertaken on farmed wetlands,
4 except that any change in use of the wetlands
5 for the purpose of undertaking activities that
6 are not exempt from regulation under this sub-
7 section shall be subject to this section;

8 “(G) result from any activity with respect
9 to which a State has an approved program for
10 which an application was submitted under sec-
11 tion 208(b)(4) that meets the requirements of
12 subparagraphs (B) and (C) of such section;

13 “(H) are consistent with a State or local
14 land management plan submitted to the Sec-
15 retary and approved pursuant to paragraph (2);

16 “(I) are undertaken in connection with a
17 marsh management and conservation program
18 in a coastal parish in Louisiana if the program
19 has been approved by the Governor of the State
20 or the designee of the Governor;

21 “(J) are undertaken on lands or involve
22 activities within a coastal zone of a State that
23 are excluded from regulation under the State
24 coastal zone management program approved

1 under the Coastal Zone Management Act of
2 1972 (16 U.S.C. 1451 et seq.);

3 “(K) are undertaken in incidentally created
4 wetlands, unless the incidentally created wet-
5 lands have exhibited wetlands functions and val-
6 ues for more than 5 years (in which case activi-
7 ties undertaken in the wetlands shall be subject
8 to the requirements of this section);

9 “(L) are part of expanding an ongoing
10 farming operation involving the water depend-
11 ent, obligate crop, *Vaccinium macrocarpin*, if—

12 “(i) the expansion does not occur in
13 type A wetlands;

14 “(ii) the expansion does not result in
15 the conversion of more than 10 acres of
16 wetlands or waters of the United States
17 per operator per year; and

18 “(iii) the converted wetlands or waters
19 of the United States (other than in loca-
20 tions where dikes and other necessary fa-
21 cilities are placed) remain as wetlands or
22 other waters of the United States; or

23 “(M) result from aggregate or clay mining
24 activities in wetlands or waters of the United
25 States conducted pursuant to a State or

1 Federal permit that requires the reclamation of
2 the wetlands or waters of the United States, if
3 the reclamation meets conditions for reclama-
4 tion, including conditions that—

5 “(i) the reclamation shall be com-
6 pleted within 5 years of the commencement
7 of activities in the wetlands or waters; and

8 “(ii) on completion of the reclamation,
9 the wetlands or waters shall support func-
10 tions (including wetlands functions, as ap-
11 propriate) and values equivalent to the
12 functions and values supported by the wet-
13 lands or waters at the time of commence-
14 ment of the activities.

15 “(2) STATE AND LOCAL LAND MANAGEMENT
16 PLANS.—

17 “(A) DEVELOPMENT AND SUBMISSION OF
18 PLAN.—Any State or political subdivision of a
19 State acting pursuant to State authorization
20 may develop a land management plan with re-
21 spect to lands that include wetlands. A State or
22 local government agency, acting on behalf of
23 the State or political subdivision, may submit
24 the plan to the Secretary for review and ap-
25 proval. The Secretary shall, not later than 60

1 days after receipt of the plan, notify a des-
 2 ignated State or local official in writing of ap-
 3 proval or disapproval of the plan.

4 “(B) APPROVAL.—The Secretary shall ap-
 5 prove any plan described in subparagraph (A)
 6 that is consistent with the objectives of this sec-
 7 tion. No person shall be entitled to judicial re-
 8 view of the decision of the Secretary to approve
 9 or disapprove a land management plan under
 10 this paragraph.

11 “(C) CONSTRUCTION.—Nothing in this
 12 paragraph shall be construed to alter, limit, or
 13 supersede the authority of a State or political
 14 subdivision of a State to establish a land man-
 15 agement plan for purposes other than the objec-
 16 tives of this subsection.

17 “(g) STANDARDS FOR DELINEATING WETLANDS.—

18 “(1) IN GENERAL.—

19 “(A) ESTABLISHMENT OF STANDARDS.—
 20 The Secretary shall establish standards, by reg-
 21 ulation issued under subsection (i), that shall
 22 govern the delineation of lands as wetlands for
 23 purposes of this section.

24 “(B) CONSULTATION.—Before establishing
 25 standards as described in subparagraph (A),

1 the Secretary shall consult with the heads of
2 other departments and agencies of the United
3 States, including the Director, the Adminis-
4 trator of the Environmental Protection Agency,
5 and the Chief of the Soil Conservation Service
6 of the Department of Agriculture.

7 “(C) STANDARDS BINDING ON FEDERAL
8 AGENCIES.—The standards established as de-
9 scribed in subparagraph (A) shall bind all Fed-
10 eral agencies in connection with the administra-
11 tion or implementation of this section.

12 “(2) DELINEATION OF WETLANDS.—

13 “(A) IN GENERAL.—The standards estab-
14 lished as described in paragraph (1)(A) shall be
15 issued in accordance with this paragraph, and
16 any decision of the Secretary, the Director, or
17 any other Federal officer or employee made in
18 connection with the administration of the stand-
19 ards, shall be made in accordance with this
20 paragraph.

21 “(B) REQUIREMENTS FOR DELINEATION
22 OF WETLANDS.—For purposes of this section,
23 lands shall be delineated as wetlands only if—

24 “(i) the lands are wetlands, as defined
25 in section 502;

1 “(ii) the Secretary finds clear evidence
2 of wetlands hydrology, hydrophytic vegeta-
3 tion, and hydric soil during the period in
4 which the delineation (to be conducted dur-
5 ing the growing season unless otherwise re-
6 quested by the applicant) is made;

7 “(iii) the delineation does not result in
8 the classification of vegetation as
9 hydrophytic if the vegetation is equally
10 adapted to dry or wet soil conditions or is
11 more typically adapted to dry soil condi-
12 tions than to wet soil conditions;

13 “(iv) the Secretary finds some obli-
14 gate wetlands vegetation present during
15 the period of delineation (except that if the
16 vegetation is removed for the purpose of
17 evading a requirement of this section, this
18 clause shall not apply);

19 “(v) the delineation does not result in
20 the conclusion that conditions of wetlands
21 hydrology are present unless the Secretary
22 finds water present at the surface of the
23 lands for at least 21 consecutive days dur-
24 ing the growing season (or period re-
25 quested by the applicant) in which such de-

1 lineation is made and for 21 consecutive
2 days in the growing seasons in a majority
3 of the years for which records are avail-
4 able; and

5 “(vi) the lands were not temporarily
6 or incidentally created as a result of adja-
7 cent development activity.

8 “(C) NORMAL CIRCUMSTANCES.—For the
9 purpose of delineating wetlands under this sec-
10 tion, a normal circumstance shall be determined
11 on the basis of the factual circumstance in ex-
12 istence on the date a classification is made
13 under subsection (h), or on the date of applica-
14 tion under subsection (b), whichever is applica-
15 ble, if the circumstance has not been altered by
16 an activity prohibited under this section.

17 “(h) UNITED STATES FISH AND WILDLIFE SERVICE
18 WETLANDS IDENTIFICATION AND CLASSIFICATION
19 PROJECT.—

20 “(1) IN GENERAL.—The Director, after receiv-
21 ing the concurrence of the Chief of the Soil Con-
22 servation Service, shall conduct a project to identify
23 and classify wetlands in the United States. The Di-
24 rector shall complete the project not later than 10
25 years after the date of enactment of the Comprehen-

1 sive Wetlands Conservation and Management Act of
2 1994.

3 “(2) STANDARDS FOR CLASSIFYING WET-
4 LANDS.—In conducting the project, the Director
5 shall identify and classify wetlands in accordance
6 with the standards for delineation of wetlands estab-
7 lished by the Secretary as described in paragraphs
8 (1) and (2) of subsection (g).

9 “(3) NOTICE AND HEARING.—Before comple-
10 tion of identification and classification of wetlands
11 under paragraph (1), the Director shall provide no-
12 tice and an opportunity for a public hearing in each
13 county, parish, or borough that includes lands sub-
14 ject to identification and classification.

15 “(4) PUBLICATION.—Promptly after completion
16 of identification and classification of wetlands under
17 paragraph (1), the Director shall publish informa-
18 tion concerning the identification and classification
19 in the Federal Register and in publications of wide
20 circulation and take other steps reasonably necessary
21 to ensure that information concerning the identifica-
22 tion and classification is made available to the pub-
23 lic.

24 “(5) RECORDING.—The Director shall, to the
25 fullest extent practicable, record any classification of

lands as wetlands under paragraph (1) on the property records in the county, parish, or borough in which the wetlands are located.

“(6) REPORT TO CONGRESS.—Not later than 2 years after the date of enactment of the Comprehensive Wetlands Conservation and Management Act of 1994, and annually thereafter, the Secretary of the Interior shall prepare and submit to the appropriate committees of Congress a report on implementation of the project conducted under this subsection.

“(i) ADMINISTRATIVE PROVISIONS.—

“(1) PROMULGATION OF FINAL REGULATIONS.—Not later than 1 year after the date of enactment of the Comprehensive Wetlands Conservation and Management Act of 1994, the Secretary shall, after notice and opportunity for public comment, issue 1 or more final regulations for the issuance of permits under this section. The regulations shall—

“(A) establish standards and procedures for—

“(i) the classification and delineation of wetlands, and procedures for administrative review of the classification or delineation of wetlands;

1 “(ii) the review of State or local land
2 management plans and State programs for
3 the regulation of wetlands and waters of
4 the United States;

5 “(iii) the issuance of general permits
6 on a national, regional, or statewide basis
7 under this section;

8 “(iv) the issuance of individual permit
9 applications under this section;

10 “(v) enforcement of this section;

11 “(vi) administrative appeal of an ac-
12 tion by the Secretary denying an applica-
13 tion for a permit referred to in subsection
14 (b), or issuing a permit referred to in sub-
15 section (b) subject to 1 or more conditions;
16 and

17 “(vii) any other related area that the
18 Secretary determines necessary or appro-
19 priate to implement the requirements of
20 this section; and

21 “(B) establish requirements governing the
22 establishment of a mitigation bank.

23 “(2) JUDICIAL REVIEW OF A FINAL REGULA-
24 TION.—

1 “(A) IN GENERAL.—Except as provided in
2 subparagraph (B), any judicial review of a final
3 regulation issued pursuant to paragraph (1),
4 and any denial by the Secretary of a petition
5 for the issuance or repeal of a regulation under
6 paragraph (1), shall be conducted in accordance
7 with sections 701 through 706 of title 5, United
8 States Code.

9 “(B) JURISDICTION OF COURT.—A peti-
10 tion for review of the action of the Secretary in
11 issuing a regulation under paragraph (1), or de-
12 nying a petition for the issuance or repeal of a
13 regulation under paragraph (1), may be filed
14 only in the United States Court of Appeals for
15 the District of Columbia. The petition for re-
16 view may only be filed—

17 “(i) not later than 90 days after the
18 date of issuance or denial; or

19 “(ii) if the petition for review is based
20 solely on grounds arising after the date of
21 issuance or denial, not later than 90 days
22 after the date the grounds arise.

23 Action by the Secretary with respect to which
24 review could have been obtained under this

1 paragraph shall not be subject to judicial review
2 in civil or criminal proceedings for enforcement.

3 “(3) INTERIM REGULATIONS.—

4 “(A) PROMULGATION OF INTERIM REGU-
5 LATIONS.—Not later than 90 days after the
6 date of enactment of the Comprehensive Wet-
7 lands Conservation and Management Act of
8 1994, the Secretary shall issue interim regula-
9 tions consistent with paragraph (1). The in-
10 terim regulations shall become effective on the
11 date of issuance. Notice of the interim regula-
12 tions shall be published in the Federal Register.
13 Except as provided in subparagraph (B), the in-
14 terim regulations shall apply until the issuance
15 of final regulations under paragraph (1).

16 “(B) WAIVER OF INTERIM REGULA-
17 TIONS.—The Secretary shall provide a proce-
18 dure for waiving a provision of an interim regu-
19 lation—

20 “(i) in a case in which the applicant
21 demonstrates special hardship, inequity, or
22 unfair distribution of burdens; or

23 “(ii) in a case in which the Secretary
24 determines that a waiver under this sub-

1 paragraph would advance the purposes of
2 this section.

3 “(4) AUTHORITY TO CARRY OUT REGULA-
4 TIONS.—Except as otherwise expressly provided in
5 this section, the Secretary shall be responsible for
6 carrying out this subsection. The Secretary or any
7 other Federal officer or employee in whom any func-
8 tion under this section is vested or to whom any
9 such function is delegated may perform any and all
10 acts (including appropriate enforcement activity),
11 and may prescribe, issue, amend, or rescind any reg-
12 ulation or order the officer or employee may find
13 necessary or appropriate to prescribe, issue, amend,
14 or rescind under this section, subject to the require-
15 ments of this section.

16 “(j) VIOLATIONS.—

17 “(1) ENFORCEMENT BY SECRETARY.—When-
18 ever the Secretary finds, on the basis of reliable and
19 substantial information and after reasonable inquiry,
20 that a person is or may be in violation of this section
21 or a condition or limitation set forth in a permit is-
22 sued by the Secretary under subsection (b) the Sec-
23 retary shall—

1 “(A) issue an order requiring the person to
2 comply with this section or with the condition
3 or limitation in the permit; or

4 “(B) bring a civil action in accordance
5 with paragraph (3).

6 “(2) ORDERS ISSUED BY SECRETARY.—

7 “(A) COPY OF ORDER SENT TO STATES.—

8 A copy of each order issued under paragraph
9 (1) shall be sent immediately by the Secretary
10 to the Governor of the State in which the viola-
11 tion occurred and the Governor of any other af-
12 fected State.

13 “(B) SERVICE.—Except as provided in
14 subparagraph (C), any order issued under para-
15 graph (1) shall—

16 “(i) be issued by personal service to
17 the appropriate person or corporate officer;

18 “(ii) state with reasonable specificity
19 the nature of the asserted violation; and

20 “(iii) specify a period for compliance,
21 not to exceed 30 days, that the Secretary
22 determines is reasonable (taking into ac-
23 count the seriousness of the asserted viola-
24 tion and any good faith efforts to comply
25 with applicable requirements).

1 “(C) TIME LIMIT ON ORDER.—

2 “(i) IN GENERAL.—Not later than
3 150 days after the date of service under
4 subparagraph (B), the Secretary shall—

5 “(I) take such action as is nec-
6 essary for the prosecution of a civil
7 action in accordance with paragraph
8 (3); or

9 “(II) rescind the order issued
10 under paragraph (1) and be estopped
11 from any further enforcement pro-
12 ceeding for the same asserted viola-
13 tion.

14 “(ii) DISPUTED ORDERS.—If a person
15 receiving service under subparagraph (B)
16 disputes the finding described in para-
17 graph (1) and notifies the Secretary in
18 writing not later than 90 days after the
19 service, the Secretary shall, not later than
20 60 days after receiving the notification of
21 the dispute—

22 “(I) take such action as is nec-
23 essary for the prosecution of a civil
24 action in accordance with paragraph
25 (3); or

1 “(II) rescind the order and be es-
2 topped from any further enforcement
3 proceeding for the same asserted vio-
4 lation.

5 “(3) CIVIL ACTIONS.—The Secretary may com-
6 mence a civil action for appropriate relief, including
7 a permanent or temporary injunction, for any viola-
8 tion for which the Secretary may issue an order
9 under paragraph (1). An action commenced under
10 this paragraph may be brought in the district court
11 of the United States for the district in which the de-
12 fendant is located or resides or is doing business,
13 and the court shall have jurisdiction to restrain the
14 violation and to require compliance. Notice of the
15 commencement of the action shall be given imme-
16 diately to the Governor of any affected State.

17 “(4) PENALTIES.—Any person who violates this
18 section or a condition or limitation in a permit is-
19 sued by the Secretary under subsection (b), or who
20 violates an order issued by the Secretary under
21 paragraph (1), shall be subject to a civil penalty not
22 to exceed \$25,000 per day for each violation in-
23 volved, commencing on the day following expiration
24 of the period allowed for compliance. The amount of
25 the penalty imposed per day shall be in proportion

1 to the scale or scope of the project that results in
2 the violation. In determining the amount of a civil
3 penalty under this paragraph, the Secretary or the
4 Court, as appropriate, shall consider the seriousness
5 of the violation, the economic benefit (if any) result-
6 ing from the violation, any history of a previous vio-
7 lation, any good-faith effort to comply with applica-
8 ble requirements, the economic impact of the penalty
9 on the violator, and any other matter that justice
10 may require.

11 “(k) STATE AUTHORITY TO CONTROL DIS-
12 CHARGES.—Nothing in this section shall affect or impair
13 the right of a State or interstate agency to control activity,
14 including activity of a Federal agency, in waters of the
15 United States within the jurisdiction of the State or inter-
16 state agency. Each Federal agency shall comply with a
17 State or interstate requirement, whether substantive or
18 procedural, to the same extent that a person is subject
19 to the requirement. This section shall not affect or impair
20 the authority of the Secretary to maintain navigation.

21 “(l) STATE REGULATION OF WETLANDS AND WA-
22 TERS.—

23 “(1) APPLICATION FOR STATE REGULATION.—
24 The Governor of a State desiring to administer an
25 individual and general permit program for an activ-

1 ity in wetlands or waters of the United States within
2 the jurisdiction of the State shall submit to the Sec-
3 retary—

4 “(A) a description of the program pro-
5 posed to be established and administered under
6 State law; and

7 “(B) a statement from the chief legal offi-
8 cer of the State that the State law provides
9 adequate authority to carry out the described
10 program.

11 “(2) DETERMINATION BY SECRETARY.—Not
12 later than 1 year after the date of receipt by the
13 Secretary of a program description and statement
14 under paragraph (1), the Secretary shall determine
15 whether the State has the authority to—

16 “(A) issue permits that—

17 “(i) apply, and ensure compliance
18 with, each applicable requirement of this
19 section; and

20 “(ii) can be terminated or modified
21 for cause, including—

22 “(I) a violation of any condition
23 or limitation in the permit;

24 “(II) evidence that the permit
25 was obtained by misrepresentation or

1 failure to disclose fully all relevant
2 facts; or

3 “(III) a change in any condition
4 that requires either a temporary or
5 permanent reduction or elimination of
6 the permitted activity;

7 “(B)(i) issue permits that apply, and en-
8 sure compliance with, all applicable require-
9 ments of section 308; or

10 “(ii) inspect, monitor, enter, and require
11 reports to at least the same extent as required
12 under section 308;

13 “(C) ensure that the public, and any other
14 State in which the wetlands or waters of the
15 United States may be affected by the issuance
16 of a permit under this subsection, receive notice
17 of each application for a permit under this sub-
18 section and provide an opportunity for a public
19 hearing before a ruling on the application;

20 “(D) ensure that the Secretary receives no-
21 tice of each application for a permit under this
22 subsection and, prior to any action by the
23 State, ensure that both the applicant for the
24 permit and the State receive from the Secretary
25 information with respect to any advance classi-

1 fication applicable to wetlands or waters of the
2 United States that are the subject of the appli-
3 cation;

4 “(E) ensure that each State (other than
5 the State seeking to issue permits under this
6 subsection) in which the wetlands or waters of
7 the United States may be affected by the issu-
8 ance of a permit under this subsection may sub-
9 mit a written recommendation to the permitting
10 State with respect to any permit application
11 and, if any part of the written recommendation
12 is not accepted by the permitting State, ensure
13 that the permitting State will notify the af-
14 fected State (and the Secretary) in writing of
15 the failure by the permitting State to accept the
16 recommendation together with the reason for
17 the failure by the permitting State to accept the
18 recommendation of the affected State; and

19 “(F) abate a violation of the permit or the
20 permit program, through a civil or criminal
21 penalty or other means of enforcement.

22 “(3) APPROVAL OR MODIFICATION OF PRO-
23 GRAM.—

24 “(A) APPROVAL OF PROGRAM.—If, with
25 respect to a proposed State program for which

1 a description and statement were submitted
2 under paragraph (1), the Secretary determines
3 that the State has the authority set forth in
4 paragraph (2), the Secretary shall approve the
5 program, notify the State, and suspend the is-
6 suance of permits under subsection (b) for each
7 activity with respect to which a permit may be
8 issued pursuant to the State program.

9 “(B) MODIFICATION OF PROGRAM.—If,
10 with respect to a proposed State program for
11 which a description and statement were submit-
12 ted under paragraph (1), the Secretary deter-
13 mines that the State does not have the author-
14 ity set forth in paragraph (2), the Secretary
15 shall notify the State and provide a description
16 of any revision or modification necessary so
17 that the State may resubmit the program for
18 another determination by the Secretary under
19 this subsection.

20 “(4) FAILURE OF SECRETARY TO MAKE DETER-
21 MINATION.—If, with respect to a proposed State
22 program for which a description and statement were
23 submitted under paragraph (1), the Secretary fails
24 to make a determination within 1 year after the date
25 of receipt of the description and statement, the pro-

1 posed program shall be deemed to be approved pur-
2 suant to paragraph (3)(A) on the day that is 1 year
3 after such date, the Secretary shall notify the State
4 of the approval, and the Secretary shall suspend the
5 issuance of permits under subsection (b) for each ac-
6 tivity with respect to which a permit may be issued
7 pursuant to the State program.

8 “(5) TRANSFER OF APPLICATIONS.—After ap-
9 proval of a State permit program under this sub-
10 section, the Secretary shall transfer to the State for
11 appropriate action any application for a permit
12 pending before the Secretary for an activity with re-
13 spect to which a permit may be issued pursuant to
14 the State program.

15 “(6) SUSPENSION OF ENFORCEMENT.—If the
16 Secretary is notified that a State with a permit pro-
17 gram approved under this subsection intends to ad-
18 minister and enforce the terms and conditions of a
19 general permit issued by the Secretary under sub-
20 section (e)(6), the Secretary shall, with respect to
21 each activity in the State to which the general per-
22 mit applies, suspend the administration and enforce-
23 ment of the general permit.

24 “(7) CORRECTIVE ACTION.—If the Secretary
25 determines after a public hearing that a State ad-

1 ministering a program approved under this sub-
2 section is not administering the program in accord-
3 ance with this section, the Secretary shall notify the
4 State and, if appropriate corrective action is not
5 taken within a reasonable time (not to exceed 90
6 days after the date of the receipt of the notification),
7 the Secretary shall—

8 “(A) withdraw approval of the program
9 until the Secretary determines appropriate cor-
10 rective action has been taken; and

11 “(B) resume the program for the issuance
12 of permits under subsections (b) and (e)(6) for
13 all activities with respect to which the State
14 was issuing permits, until such time as the Sec-
15 retary makes the determination described in
16 paragraph (2) and approves the State program
17 again.

18 “(8) REGULATION BY AN INTERSTATE AGEN-
19 CY.—For purposes of this subsection:

20 “(A) GOVERNOR.—The term ‘Governor’ in-
21 cludes the head of an interstate agency.

22 “(B) STATE.—The term ‘State’ includes
23 an interstate agency.

24 “(C) STATE LAW.—The term ‘State law’
25 includes an interstate compact.

1 “(m) COPIES AVAILABLE TO PUBLIC.—A copy of
2 each permit application submitted, and each permit is-
3 sued, under this section shall be available to the public.
4 Each permit application or portion of a permit application
5 shall also be available on request for the purpose of repro-
6 duction.

7 “(n) COMPLIANCE WITH PERMIT SATISFIES RE-
8 QUIREMENTS.—Compliance with a permit issued pursuant
9 to this section, including carrying out an activity pursuant
10 to a general permit issued under this section, shall be
11 deemed, for purposes of sections 309 and 505, to be com-
12 pliance with sections 301, 307, and 403.

13 “(o) EFFECTIVE DATE FOR PERMIT PROVISIONS.—
14 After the 90th day after the date of enactment of the
15 Comprehensive Wetlands Conservation and Management
16 Act of 1994, no permit for an activity in wetlands or wa-
17 ters of the United States may be issued except in accord-
18 ance with this section. Any permit for an activity in wet-
19 lands or waters of the United States issued prior to the
20 90th day shall be deemed to be a permit under this section
21 and shall continue in force and effect for the term of the
22 permit unless revoked, modified, or suspended in accord-
23 ance with this section. An application for a permit pending
24 under this section on the 90th day shall be deemed to be
25 an application for a permit under this section.

1 “(p) LIMIT ON FEES.—Any fee charged in connection
2 with—

3 “(1) the delineation or classification of wet-
4 lands;

5 “(2) an application for a permit authorizing an
6 activity in wetlands or waters of the United States;
7 or

8 “(3) any other action taken in compliance with
9 the requirements of this section (other than a pen-
10 alty for a violation under subsection (j));

11 shall not exceed the amount of the fee in effect on January
12 1, 1990.”.

13 **SEC. 4. DEFINITIONS.**

14 Section 502 of the Federal Water Pollution Control
15 Act (33 U.S.C. 1362) is amended by adding at the end
16 the following new paragraph:

17 “(21) WETLANDS.—The term ‘wetlands’ means
18 lands, such as swamps, marshes, bogs, and similar
19 areas, that have a predominance of hydric soils and
20 that are inundated by surface water at a frequency
21 and duration sufficient to support, and that under
22 normal circumstances support, a prevalence of vege-
23 tation typically adapted for life in saturated soil con-
24 ditions.”.

1 **SEC. 5. TECHNICAL AND CONFORMING AMENDMENTS.**

2 (a) Section 119(c)(2)(E) of the Federal Water Pollu-
3 tion Control Act (33 U.S.C. 1269(c)(2)(E)) is amended
4 by striking “wetland” and inserting “wetlands”.

5 (b) Section 208(b)(4)(B)(iii) of the Federal Water
6 Pollution Control Act (33 U.S.C. 1288(b)(4)(B)(iii)) is
7 amended by striking “the guidelines established under sec-
8 tion 404(b)(1), and” and inserting “section 404, and with
9 the guidelines established under”.

10 (c) Section 309 of such Act (33 U.S.C. 1319) is
11 amended—

12 (1) in subsection (a)—

13 (A) in the first sentence of paragraph (1),
14 by striking “or 404”; and

15 (B) in paragraph (3), by striking “or in a
16 permit issued under section 404 of this Act by
17 a State”;

18 (2) in subsection (c)—

19 (A) in paragraph (1)(A), by striking “or in
20 a permit issued under section 404 of this Act
21 by the Secretary of the Army or by a State”;

22 (B) in paragraph (2)(A), by striking “or in
23 a permit issued under section 404 of this Act
24 by the Secretary of the Army or by a State”;
25 and

1 (C) in the first sentence of paragraph
2 (3)(A), by striking “or in a permit issued under
3 section 404 of this Act by the Secretary of the
4 Army or by a State,”;

5 (3) in the first sentence of subsection (d), by
6 striking “or in a permit issued under section 404 of
7 this Act by a State,,”; and

8 (4) in subsection (g)—

9 (A) by striking paragraph (1) and insert-
10 ing the following new paragraph:

11 “(1) VIOLATIONS.—If the Administrator finds,
12 on the basis of any information available, that a per-
13 son has violated section 301, 302, 306, 307, 308,
14 318, or 405, or has violated any permit condition or
15 limitation implementing any of such sections in a
16 permit issued under section 402 by the Adminis-
17 trator or by a State, the Administrator may, after
18 consultation with the State in which the violation oc-
19 curred, assess a class I civil penalty or a class II
20 civil penalty under this subsection.”;

21 (B) in the third sentence of paragraph
22 (2)(B), by striking “and the Secretary”;

23 (C) in paragraph (6)(A)(iii), by striking “,
24 the Secretary,”;

1 (D) by striking “or Secretary, as the case
 2 may be,” and “or the Secretary, as the case
 3 may be,” each place they appear; and

4 (E) by striking “or Secretary”, “or the
 5 Secretary”, and “or Secretary’s” each place
 6 they appear.

7 **SEC. 6. EFFECTIVE DATE.**

8 The amendments made by this Act shall become ef-
 9 fective 90 days after the date of enactment of this Act.

○

S 2490 IS——2

S 2490 IS——3

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